



REPUBLIC OF KENYA



KENYA LAW
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**Masoud & another v Masoud & 2 others (Civil Appeal 91 of 2022)
[2025] KEHC 16023 (KLR) (7 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16023 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 91 OF 2022
M THANDE, J
NOVEMBER 7, 2025**

BETWEEN

KASSIM ABUBAKAR MASOUD 1ST APPELLANT

RAHMA ABUBAKAR MASOUD 2ND APPELLANT

AND

MUNIR ABUBAKAR MASOUD 1ST RESPONDENT

ALI MOHAMED ALI 2ND RESPONDENT

SULEKHA ABUBAKAR MASOUD 3RD RESPONDENT

JUDGMENT

1. The Appeal herein arises from the ruling and orders of Hon. Twalib B. Mohamed, Senior Principal Kadhi, delivered on 27.9.22 in Malindi Miscellaneous Application No. 24 of 2019.
2. The ruling is in respect of an application dated 17.2.21 in which the Appellants sought stay of execution, review and setting aside of the judgment of the Hon. Kadhi dated 9.9.19. They also sought their joinder in the proceedings as interested parties/objectors and the joinder of the 2nd and 3rd Respondents in the cause as interested parties. Their final prayer was that all documents produced in court as evidence be forwarded to the DCIO for verification of signatures and that a report be filed in court.
3. The background of the matter as can be gleaned from the record is that the suit in the Kadhi's court relates to the estate of Abubakar Masoud (deceased). In the judgment dated 9.9.19, the Hon. Kadhi found inter alia that the 2nd and 3rd Respondents had bought a 50x70 feet portion of Plot No. 599 Malindi from the deceased, and ordered that the same be vested in them in equal shares. In their application, the Appellants claimed that the agreement for sale of the said portion produced in court was a forgery.



4. In his ruling, the Hon. Kadhi found that the Appellants did not provide forensic evidence on their concern of the documentary forgeries alleged. He further found that the Appellants' claim that the signature of the deceased differs substantially from the purported signature in the sale agreement and that the judgment obtained through misinterpretation of facts, forgeries and falsehood were grounds for appeal. He further stated that vide the judgment of 9.9.19, the 1st and 2nd Interested Parties (2nd and 3rd Respondents) have a title deed of the suit premises registered in their names. He then granted leave to the Appellants to follow up the "documentary forgery issues with the appropriate authorities".
5. Being aggrieved by the decision of the Hon. Kadhi, the Appellant preferred this Appeal. The summarized grounds are that the Hon. Kadhi erred in law and fact by:
 - i. ignoring or failing to take into consideration the facts and submissions laid before him by the Appellants.
 - ii. failing to appreciate that the Respondents were in contempt of court by proceeding to subdivide Land Portion No. 599 Malindi and therefore any action taken in contempt of court is/was null and void.
 - iii. Applying wrongful principles by misapprehension of the true factual and legal position as can be derived from the pleadings.
6. The Appellants prayed that the impugned ruling be set aside. They also prayed that the subdivision of Plot No. 599 Malindi in contempt of court be declared null and void.
7. The Appeal herein emanates from the decision of the Kadhi's court. Section 65(1)(c) of the [*Civil Procedure Act*](#) provides as follows:
 - (1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—
 - (c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors."
8. Pursuant to the cited provision, the Court sought the opinion of 2 Hon. Kadhis as assessors, namely, Hon. Swaleh Mohamed Ali, Senior Principal Kadhi and Hon. Salim J. Mwaito, Principal Kadhi.
9. Being a first appeal, this Court is called upon to re-evaluate and analyze the evidence on record being mindful that it neither saw nor heard the witnesses testify. (See *Selle v Associated Motor Boat Co.* [1968] EA 123). The Court is also guided by the Court of Appeal decision in *Samuel Mwanasokoni v Kenya Bus Services Ltd* [1985] eKLR, where it stated:

Although this Court on appeal will not lightly differ from the judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the House of Lords in *Sotiros Shipping v Sauviet Sohoid*, *The Times*, March 16, 1983:

"It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate Court they should be ever mindful of the advantages enjoyed of the trial judge who saw and heard the witnesses and was in a



comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and, equally important, what was not said.”

10. I have reviewed the record and note that the handling of this matter by the Hon. Kadhi is deeply troubling. The Application before him dated 17.2.21 was in the main, for review and setting aside of the judgment and orders of 9.9.19.
11. The jurisdiction of the Kadhi’s court to review its own judgment is contained in Rule 79 of The Kadhis’ Courts (Procedure and Practice) Rules, 2020 which provides:
 1. A person who is aggrieved by a judgment, ruling or an order from which an appeal is allowed but from which no appeal is preferred, may within reasonable time, apply for a reconsideration of the judgment, ruling or order—considering himself aggrieved—
 - a. if there is discovery of new evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the judgment, ruling or order was made;
 - b. on account of some mistake or error apparent on the face of the record;
 - c. if the judgment, ruling or order requires clarification; or
 - d. for any other sufficient reason.
 2. An application for review of a decree or order of the Court under paragraphs (b), (c) or (d), shall be made to the Kadhi who passed the decree or made the order sought to be reviewed or to any other Kadhi if that Kadhi is not attached to the Court station.
 3. A party seeking the review of a judgment, ruling or order of the Court shall apply to the Court by way of an application and shall attach a copy of the judgment, ruling or order to be reviewed.
 1. The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.
12. The jurisdiction of a court to review orders is limited to situations where there is recovery of new and important matter or evidence which after due diligence, was not within an aggrieved person’s knowledge or could not be produced at the time the order was made. A mistake or error apparent on the face of the record is another ground upon which the court can allow review of an order or for any other sufficient reason. The law further requires that an application for review, no matter the grounds, must be without unreasonable delay. Further, an order for review is discretionary and an applicant must persuade the court that it is deserving of such order by demonstrating the elements set out in the law.
13. In considering the prayer for review and setting aside of the judgment of 9.9.19, the Hon. Kadhi should have been guided by the provisions of Rule 79. To this end, the Hon. Kadhi ought to have addressed his mind first, to when it came to the knowledge of the Appellants that the agreement in question was a forgery and whether with due diligence, this fact would have been known to them. Second, the Hon. Kadhi ought to have interrogated whether the allegedly forged agreement was an error apparent on the face of the record. Lastly, the Hon. Kadhi ought to have satisfied himself that the application was brought within reasonable time.
14. There is nothing in the impugned ruling to show that the Hon. Kadhi applied the principles set out in Rule 79. Rather, the record shows that by a ruling dated 15.7.21, the Hon. Kadhi stated that the issues raised by the Appellants in their application were never ventilated. Further, that to reach a fair



and just decision, the court must be seized of all material facts which can only be achieved through a trial where parties will ventilate their position and tender evidence. He then proceeded to allow the application as prayed. He further directed that the matter be heard de novo upon filing of appropriate documents by the parties.

15. It must be noted that this is a matter that had been heard and a judgment rendered. In effect, the Hon. Kadhi purported to sit on appeal of a decision of a court of concurrent jurisdiction, namely his own.
16. It is trite law that a Court's jurisdiction is conferred and not inferred. A Court therefore may only exercise such jurisdiction as has been conferred upon it by *the Constitution*, statute or both. In Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the Supreme Court succinctly stated as follows:

A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

17. The jurisdiction of Kadhi Courts flows from *the Constitution* and from the Kadhi's Court Act. Article 170(5) of *the Constitution* provides:

The jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.

Section 5 of the Kadhis' Court Act is couched along similar terms.

18. The jurisdiction of Kadhis' courts is limited to questions of Muslim law relating to personal status, marriage, divorce or inheritance. That jurisdiction does not include appellate jurisdiction.
19. The proceedings relating to the application dated 17.2.21 in which the Hon. Kadhi received new evidence were clearly conducted in violation of the law and in excess of the Hon. Kadhi's jurisdiction. As such, they are null and void and cannot stand.
20. In his opinion, the Hon. Salim J. Mwaito, Principal Kadhi was of the view that the Appeal has merit as by dint of Article 170(5) of *the Constitution*, the Hon. Kadhi lacked jurisdiction to determine the dispute relating to the sale of a portion of the suit property. He stated:

10. In the instant case, and as already noted, the court was sitting as a probate court and the same notwithstanding, was presented with a case wherein the appellant urged that the plot 599 Malindi belonged to his father(deceased) and that his father never sold it to the interested parties, while the Interested parties claimed the same was sold to them by the deceased,

11. The trial court had no capacity to determine issues related to sale agreement and their legality and my opinion is supported by persuasive authorities that support the position that Kadhi has no jurisdiction to entertain disputes touching on ownership of property of title to property.

21. Hon. Swaleh Mohamed Ali, Senior Principal Kadhi was of a similar view and opined that the Hon. Kadhi acted in excess of jurisdiction. He stated:

Now, the dispute on whether the deceased sold a portion of his land in Plot No. 599 Malindi to the appellants, properly falls within the jurisdiction of the Environment and Land Court, not the Kadhi's Court. Article 162(2) of *the Constitution* of Kenya 2010, and Section 13 of the *Environment and Land Court Act* gives the Environment and Land Court



original and appellate jurisdiction to hear all disputes related to environment, land use, land administration and management etc. This is to say that the dispute brought before the Kadhi was a preserve of the Environment and Land Court and not the Kadhi's Court.

With the utmost respect to Emeritus Kadhi Twalib Bwana, I submit that he erred both in law and in fact by entertaining a matter that was outside the jurisdiction of the Kadhi's Court. In doing so, he purported to exercise powers that were not conferred upon him.

22. I concur with the opinions of the Hon. Kadhis that the Appeal should be allowed for want of jurisdiction. However, my reasons are different as indicated above.
23. I am aware that the Appeal herein relates to the ruling dated 27.9.22. However, having found that the proceedings in question are a nullity, there is need to correct the same to ensure the fair administration of justice.
24. Article 165(6) and (7) of *the Constitution* confer upon this Court supervisory jurisdiction over subordinate courts as follows:
 - (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
25. I accordingly invoke the provisions of Article 165(6) and (7) of *the Constitution* and set aside the rulings dated 15.7.21 and 27.9.22 and the proceedings related thereto. I further direct that the prayer for review in the application dated 17.2.21 be heard by a Kadhi other than Hon. Sheikh Twalib B. Mohamed. This being a family matter, I direct that each party bears own costs.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 7TH DAY OF NOVEMBER 2025

M. THANDE

JUDGE

